

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue date: 19Sep2002**

CASE NO.: 2002-BLA-148

In the Matter of:

HAROLD L. OWENS  
Claimant

v.

COPPER VALLEY COAL CO.  
Employer

and

ROCKWOOD INSURANCE CO.  
Carrier

and

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS  
Party in Interest

**APPEARANCES:**

Harold L. Owens  
*Pro Se*

Sean B. Epstein, Esq.  
For the Employer/Carrier

Before: DANIEL L. LELAND  
Administrative Law Judge

**DECISION AND ORDER - DENYING BENEFITS**

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* In accordance with the Act and the pertinent regulations, this case was referred to the

Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of persons whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing was held in Ebensburg, Pennsylvania on August 6, 2002 at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations found in Title 20 code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title. At the hearing, Director's exhibits (DX) 1-148 were admitted into evidence.

### ISSUES

- I. Existence of pneumoconiosis.
- II. Causal relationship of pneumoconiosis and coal mine employment.
- III. Existence of total disability.
- IV. Causation of total disability.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW<sup>1</sup>

#### Procedural History

Harold L. Owens (claimant or miner) filed a claim for benefits under the Act on July 16, 1993. (DX 1). He was found entitled to benefits by the district director, and following the employer's request for hearing, the case was referred to the Office of Administrative Law Judges (OALJ). (DX 30, 35, 41). After a remand to the district director and a second referral to OALJ, a hearing was held on December 15, 1995 before Administrative Law Judge Thomas M. Burke. (DX 64). Judge Burke issued a Decision and Order-Denying Benefits on June 28, 1996. (DX 65). Claimant filed an appeal with the Benefits Review Board, but on November 25 and December 19, 1996, claimant filed a request for modification, and the Board dismissed the appeal and remanded the case to the district director to consider the modification request. (DX 66, 75, 76, 77). The district director denied the request for modification on July 15, 1997 and claimant requested a hearing. (DX 85, 88). The case was again referred to Judge Burke who issued an Order Denying Modification on November 25, 1997. (DX 94). Claimant again appealed to the Board, and on May 24, 1999, the Board issued a Decision and Order remanding the case to the administrative law judge. (DX 97). A hearing was held before the undersigned on October 11, 2000, and a Decision and Order-Denying Benefits was issued on November 17, 2000. (DX 123, 124).

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<sup>1</sup> The following abbreviations have been used in this decision and order: TR = transcript of hearing, BCR = board-certified radiologist, B = B-reader.

Claimant filed an appeal with the Benefits Review Board on December 15, 2000, but on May 22, 2001, claimant filed a request for modification, and the Board dismissed the appeal and remanded the case to the district director to consider the modification request. (DX 125, 129, 130). The district director denied the request for modification on December 5, 2001 and claimant requested a hearing. (DX 144, 145). The case was referred to OALJ for a hearing on January 24, 2002. (DX 148).

### Background

Claimant was born on June 24, 1932 and has no dependents. (DX 123, p. 10). The parties have stipulated that he was employed as a coal miner for thirty-one and three quarter years. (TR 8). He testified in the prior proceeding that he retired from coal mining in 1984 and that his last job in the mines was a face boss which occasionally required him to fill in for a man who was off. (DX 123, pp. 12-13). His duties included carrying timbers and rock dusting. (DX 123, pp. 13-14). Claimant is short of breath when he walks and he coughs daily. (DX 123, pp. 16-17). He has never smoked cigarettes and takes no medications. (DX 123, pp. 18-19). At the most recent hearing, claimant stated that his condition has not worsened in the past twenty-two months. (TR 14).

### Medical Evidence

The summary of medical evidence in the undersigned's November 17, 2000 decision and order is incorporated by reference. The following summary is of evidence submitted since the issuance of the previous decision and order.

#### Chest x-rays

<u>Exhibit</u>	<u>Date</u>	<u>Physician</u>	<u>Interpretation</u>
DX 125, 145	8/18/93	Stankiewicz	1/0, p/q
DX 141, 143	9/17/01	Boron	0/0
DX 142	9/17/01	Barrett, BCR, B	0/0

#### Pulmonary Function Studies

<u>Exhibit</u>	<u>Date</u>	<u>Height</u>	<u>Age</u>	<u>FEV1</u>	<u>FVC</u>	<u>MVV</u>
DX 137	9/17/01	65 in.	72	1.74	2.42	80.0

This study was validated by Dr. John Michos on November 16, 2001. (DX 138).

### Blood Gas Studies

<u>Exhibit</u>	<u>Date</u>	<u>PCO2</u>	<u>PO2</u>
DX 140	9/17/01	38	68
		38*	77*

\* exercise values

### Medical Reports

Dr. Angelo Illuzzi, a board-certified pulmonologist, examined claimant on September 17, 2001. (DX 139). The examination was normal and the chest x-ray was negative for pneumoconiosis. The pulmonary function study revealed mild obstructive and mild restrictive lung disease. Dr. Illuzzi diagnosed chronic bronchitis based on claimant's subjective history and obesity based on the physical examination. He stated the mild obstructive airways disease and chronic bronchitis may be due to several etiological factors including asthma, environmental factors or chronic dust exposure. Dr. Illuzzi stated that claimant is unable to perform his prior work duties due to his age, obesity and generalized poor physical condition, but his lung disease is not a major factor in his disability.

### Conclusions of Law

Within one year of a denial of benefits, a claimant may request modification based on a mistake of fact or a change in conditions. § 725.310. On modification, the ALJ must review all evidence of record - any new evidence admitted in support of modification as well as the evidence previously of record - and further reflect on whether any mistakes of fact were made in the previous adjudication of the case. *See Keating v. Director, OWCP*, 71 F.3d 1118 (3d Cir. 1995). Therefore, I must review all the evidence of record to determine if claimant is entitled to benefits.

Benefits are provided to miners who are totally disabled due to pneumoconiosis. § 718.204(a). Claimant has the burden of proving by a preponderance of the evidence that he has pneumoconiosis arising out of coal mine employment and that he is totally disabled as a result. *Gee v. W.G. Moore & Sons, Inc.*, 9 B.L.R. 1-4 (1986). A finding of the existence of pneumoconiosis may be made based on chest x-rays, autopsies or biopsies, the presumptions in §§ 718.304, 718.305, or 718.306, and the reasoned medical opinion of a physician that the miner has pneumoconiosis as defined in § 718.201.<sup>2</sup> § 718.202(a)(1)-(4). All types of relevant evidence must be weighed to determine if the miner has pneumoconiosis. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22 (3d Cir. 1997).

In the previous decision, I found that the preponderance of the x-ray evidence was

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<sup>2</sup> Pneumoconiosis is defined as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment, and it includes both medical, or clinical, pneumoconiosis and statutory, or legal, pneumoconiosis.

negative for pneumoconiosis. Claimant asserts in his request for modification that I erred by stating that Drs. Duncan, Laucks, Soble, Mital, Wolfe and Simone were B-readers at the time of reading the x-rays, as three of them had submitted expired B-reader certificates (Drs. Duncan, Laucks and Soble) and three of them did not submit B-reader certificates at all (Drs. Mital, Wolfe and Simone). An ALJ may take judicial notice of the qualifications of a physician in an official publication. *Pruitt v. Amax Coal Co.*, 7 B.L.R. 1-544, 1-546 (1984). The NIOSH B-reader list is an official publication that includes a listing of all of the physicians who have been certified as B-readers.<sup>3</sup> I take judicial notice of the NIOSH B-reader list, which states that: Dr. Duncan has been certified as a B-reader since July 1, 1985, Dr. Laucks has been certified as a B-reader since July 1, 1985, Dr. Soble has been certified as a B-reader since January 1, 1993, Dr. Mital has been certified as a B-reader since December 1, 1990, Dr. Wolfe has been certified as a B-reader since February 1, 1986, and Dr. Simone has been certified as a B-reader since November 1, 1987. These six physicians read the miner's chest x-rays between April 13, 1994 and June 28, 1995, and I find that all were certified as B-readers at the time of the readings.

There are nineteen chest x-ray interpretations in the record (including the recently submitted readings). The x-ray interpretations of physicians who are board-certified radiologists and B-readers are entitled to the greatest weight. See *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). Nine board-certified radiologists/B-readers have submitted x-ray reports in this case. Seven of them: Drs. Mital, Duncan, Laucks, Soble, Wolfe, Simone and Barrett found no radiographic evidence of pneumoconiosis. Only Drs. Mathur and Brandon read chest x-rays as positive for pneumoconiosis. Also, Dr. Gaziano, a B-reader, and Dr. Boron, who is neither a board-certified radiologist nor a B-reader, made positive readings of the August 18, 1993 x-ray. However, Dr. Boron recently read the September 17, 2001 x-ray as negative for pneumoconiosis. I find that Dr. Boron's recent negative x-ray reading cancels out his earlier positive x-ray reading, and thus his interpretations are not probative on the issue of radiographic pneumoconiosis. Drs. Strother, Bush and Schaaf, who are not board-certified radiologists or B-readers, also made negative x-ray interpretations. I again find that Dr. Patel's statement that the x-ray showed irregular opacities that could represent pneumoconiosis is too equivocal to be a definite diagnosis.

Claimant asserts that I incorrectly weighed the x-ray evidence, as there were five positive readings of the August 18, 1993 x-ray. The interpretations of the August 18, 1993 x-ray were as follows: Drs. Gaziano (B-reader), Mathur (BCR/B-reader), Brandon (BCR/B-reader), Stankiewicz and Boron read it as positive for pneumoconiosis, and Drs. Mital (BCR/B-reader), Duncan (BCR/B-reader), Laucks (BCR/B-reader), Soble (BCR/B-reader) and Strother read it as negative for pneumoconiosis. Four dually-qualified physicians read the x-ray as negative for pneumoconiosis, whereas only two dually-qualified physicians read the x-ray as positive for pneumoconiosis. I accord more weight to the readings of the dually-qualified physicians over the readings of less qualified readers. I find that the preponderance of the interpretations of the August 18, 1993 x-ray is negative for pneumoconiosis. Of the other six x-rays, all of which are later in time, only Dr. Mathur's (BCR/B-reader) reading of the June 7, 2000 x-ray was positive for pneumoconiosis. Three other dually-qualified physicians read x-rays as negative for pneumoconiosis. After reconsidering all of the chest x-ray evidence, I find that a preponderance of

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<sup>3</sup> A copy of the NIOSH B-reader list can be found on the OALJ web page at: <http://www.oalj.dol.gov/public/blalung/refrnc/bread3.htm>.

the x-ray evidence is negative for pneumoconiosis.

The record includes no biopsy evidence and claimant is not eligible for the enumerated presumptions.

There are six physician opinions in the record. Claimant argues that I erroneously considered the opinions of Drs. Strother, Bush and Fino and cites a bill (H.R. 466) that states “the responsible operator may not offer as evidence the results of more than one medical examination of the miner.” See <http://thomas.loc.gov/cgi-bin/query/z?c106:H.R.466>. However, this bill was never enacted into law.<sup>4</sup> Therefore, I will evaluate the medical opinions under § 718.202(a)(4) which includes no such limitations.

Dr. Kruk diagnosed the miner with pneumoconiosis based on his coal mine employment, non-smoking history, abnormal x-ray, low PO<sub>2</sub>, and shortness of breath on exertion. Dr. Schaaf diagnosed the miner with chronic bronchitis of unknown origin, but stated that it is likely related to environmental exposure to dust. Dr. Illuzzi diagnosed the miner with chronic bronchitis and listed the causes as asthma, environmental factors or chronic dust exposure. Dr. Strother diagnosed the miner with chronic bronchitis based on his productive cough, but found no evidence of pneumoconiosis. Dr. Bush diagnosed the miner with chronic bronchitis based on his productive cough, but could not identify its cause and did not find evidence of pneumoconiosis. Dr. Fino did not find a coal dust-related pulmonary impairment, and stated that even assuming the miner had chronic bronchitis, it was not related to his coal mine dust exposure.

Dr. Kruk partially based his diagnosis of pneumoconiosis on an abnormal reading of the August 18, 1993 x-ray. As stated above, this x-ray was later read as negative for pneumoconiosis by four dually-qualified physicians and I found by the preponderance of the evidence that this x-ray was negative for pneumoconiosis. Also, Dr. Kruk bases his diagnosis on “low PO<sub>2</sub>,” yet both the resting and exercise values are well above the values in Appendix C of § 718. I find Dr. Kruk’s opinion not to be well-reasoned, and thus accord it less weight. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(*en banc*).

Drs. Schaaf, Illuzzi, Strother and Bush diagnosed the miner with chronic bronchitis. Only Drs. Schaaf and Illuzzi opined as to the etiology of the chronic bronchitis: Dr. Schaaf stated it was likely related to coal dust exposure and Dr. Illuzzi stated it was due to asthma, environmental factors or coal dust exposure. Drs. Strother and Bush did not identify its etiology, but they did state that there was no evidence of pneumoconiosis. Dr. Fino did not diagnose the miner with chronic bronchitis, but stated that even if he had chronic bronchitis, it was not related to coal dust exposure. None of the physicians were able to state with certainty that the miner’s chronic bronchitis was caused by his coal dust exposure. I do not find Dr. Schaaf’s comment that claimant’s chronic bronchitis “was *likely* related to coal dust exposure” to be conclusive enough to establish a causal link between coal mine employment and chronic bronchitis, as required by § 718.201. I accord less weight to Dr. Schaaf’s opinion linking claimant’s chronic bronchitis to

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<sup>4</sup> The last action on this bill was its referral to the Subcommittee on Workforce Protections on February 26, 1999. See <http://thomas.loc.gov/cgi-bin/bdquery/D?d106:1:./temp/~bdQh9V:@@@X|/bss/d106query.html>.

coal mine employment because it is equivocal. *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988). In addition, I find Dr. Illuzzi's statement that claimant's chronic bronchitis was due to "asthma, environmental factors or coal dust exposure" to be equivocal and accord his opinion less weight. *Id.* Drs. Strother, Bush and Fino are board-certified internists, and Drs. Bush and Fino are board-certified pulmonologists. They based their opinions on a physical examination, chest x-ray and pulmonary function study. I find the opinions of Drs. Strother, Bush and Fino to be well-reasoned and well-documented and thus accord them greater weight. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). This finding is consistent with my previous opinion, in which I accorded more weight to the opinions of Drs. Strother, Bush and Fino. Therefore, I find that the medical opinions do not establish that claimant has pneumoconiosis. Upon review of the evidence, I find no change of condition or mistake of fact warranting a finding that claimant has pneumoconiosis pursuant to § 718.202.

Even assuming that the evidence supports a finding of pneumoconiosis, claimant has not shown that he is totally disabled due to pneumoconiosis. A miner shall be considered totally disabled if the irrebuttable presumption in § 718.304 applies. If that presumption does not apply, a miner shall be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable and gainful work. § 718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability shall be established by pulmonary function studies showing the values equal to or less than those in Appendix B, blood gas studies showing the values in Appendix C, the existence of cor pulmonale with right sided congestive heart failure, or the reasoned and documented opinion of a physician finding that the miner's pulmonary or respiratory impairment prevents him from engaging in his usual coal mine work and comparable and gainful work. § 718.204(b)(2). None of the pulmonary function or blood gas studies produced qualifying results, and there is no evidence of cor pulmonale.

Claimant argues that Dr. Kruk's opinion that claimant is totally disabled due to pneumoconiosis establishes his total disability. However, as stated in my previous decision, Dr. Kruk's finding of total disability is based solely on claimant's subjective symptoms. Dr. Kruk does not reference any objective test that supports his finding of total disability. In fact, Dr. Kruk commented that the pulmonary function study was "unremarkable" and the miner had "good exercise capacity" on the stress test. I accord less weight to Dr. Kruk's opinion because it is not supported by the objective medical evidence. *Church v. Eastern Assoc. Coal Corp.*, 20 B.L.R. 1-8 (1996). I also accord less weight to Dr. Kruk's opinion because it is not well-reasoned or well-documented. *Clark*, 12 B.L.R. 1-149. Therefore, after reviewing Dr. Kruk's medical opinion, I find that I properly discredited Dr. Kruk's opinion in the previous decision.

Dr. Schaaf also concluded that claimant is totally disabled due to pneumoconiosis. However, he does not state on what evidence he bases his opinion. As stated in my previous decision, the pulmonary function study administered by Dr. Schaaf was nonqualifying and the FEV1 and FVC were over 100% of predicted. I accord less weight to Dr. Schaaf's opinion because it is not supported by the objective medical evidence. *Church*, 20 B.L.R. 1-8. Also, Dr. Schaaf states that the miner's breathing problems are "minimal" at the end of his report, yet his cover letter states that the miner is "functionally impaired and cannot do his [last coal mine

employment]”. I find these statements to be inconsistent, and thus accord Dr. Schaaf’s opinion less weight. *Mabe v. Bishop Coal Co.*, 9 B.L.R. 1-67 (1986).

Dr. Strother is a board-certified internist and Drs. Illuzzi, Bush and Fino are board-certified pulmonologists. Drs. Bush, Fino and Strother concluded that claimant is able to do his last coal mine employment. Dr. Illuzzi concluded that claimant is totally disabled because of age, debility and obesity. I find no conflict between the opinion of Dr. Illuzzi and Drs. Bush, Fino and Strother as Dr. Illuzzi stated the miner’s lung disease “[did] not cause the majority of his inability to perform his duties”. I accord greater weight to the opinions of these four physicians because they are better supported by the objective medical evidence. *Minnich v. Pagnotti Enterprises, Inc.*, 9 B.L.R. 1-89, 1-90 n. 1 (1986). In addition, I find these opinions to be well-reasoned and well-documented, and thus accord them more weight. *Fields*, 10 B.L.R. 1-19. Upon review of the evidence, I find no change of condition or mistake of fact warranting a finding that claimant is totally disabled pursuant to § 718.204.

As the evidence does not establish any of the elements of entitlement, the claim will be denied.

#### ORDER

IT IS ORDERED THAT the claim of Harold L. Owens is DENIED.

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DANIEL L. LELAND  
Administrative Law Judge

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. Section 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this Decision and Order, by filing a notice of appeal with the ***Benefits Review Board at P.O. Box 37601, Washington, DC 20013-7601***. A copy of a notice of appeal must also be served on Donald S. Shire, Esq. Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.